(5)

No. 105, Original

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

REPLY TO COLORADO'S BRIEF IN OPPOSITION TO MOTION FOR ALTERNATIVE RELIEF

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

THOMAS M. HNASKO
BRUCE ROGOFF

Hinkle, Cox, Eaton, Coffield & Hensley
218 Montezuma
Post Office Box 2068
Santa Fe, New Mexico 87504
(505) 982-4554

March 18, 1986

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

27pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. COLORADO'S REFUSAL TO CONDUCT AN ADMINISTRATIVE INVESTIGATION MAKES LITIGATION KANSAS' ONLY EFFECTIVE REMEDY; ALTERNATIVELY, THE COURT SHOULD COMPEL COLORADO TO COMPLY WITH ARTICLE VIII(H) OF THE ARKANSAS RIVER COMPACT 2

A. The Resolution of October 8, 1985 Was Not a Bilateral Affirmation that the Investigation Should Proceed, but Rather a Unilateral Rejection of the Investigation in Regard to Each of Kansas' Allegations of Compact Violation 2

B. The Request for an Order Compelling Colorado to Comply with Article VIII(H) Need Not Be Directed to Individual Officers of the State of Colorado 5

C. The Court Has Authority to Compel Compliance with the Provisions of the Arkansas River Compact 6

1. Postcompact Well Development 7
2. Trinidad Reservoir 9
3. Pueblo Reservoir 10
4. Transmountain Return Flows 12

II. THIS COURT SHOULD EXERCISE ITS DISCRETIONARY AUTHORITY BY ENJOINING COLORADO'S POSTCOMPACT WELL USES UNTIL COMPLETION OF A MEANINGFUL ADMINISTRATIVE INVESTIGATION 14

CONCLUSION 16

Page

APPENDIX A 1a

CERTIFICATE OF SERVICE 2a

TABLE OF AUTHORITIES

CASES

Application for an Absolute Right for an Existing Exchange and Reuse Program and for a Conditional Decree for a Proposed Exchange and Reuse Program in the Arkansas River and Its Tributaries, Colorado District Court, Water Division No. 2, Case No. 84-CW-203 13

Application of the Board of Water Works of Pueblo, Colorado, Colorado District Court, Water Division No. 2, Case No. 84-CW-177 13

Arizona v. California, 376 U.S. 340 (1963) 6

Chance v. Board of Examiners, 561 F.2d 1079 (2nd Cir. 1977) 15

Colorado v. New Mexico, 459 U.S. 176 (1982), *dismissed*, 104 S.Ct. 2433 (1984) 11

Cooper v. Aaron, 358 U.S. 1 (1958) 6

In re the Amendment of the Rules and Regulations Governing the Use, Control and Protection of Surface and Ground Water Rights Located in the Arkansas River and Its Tributaries, Case Nos. W-4079, W-4080, W-4083, W-4084, and W-4085 (Dist. Ct., Water Division No. 2, Dec. 1, 1976), Finding No. 11, *aff'd sub. nom., Kuiper v. Atchiston, Topeka & Santa Fe Ry.*, 195 Colo. 557, 581 P.2d 293 (1978) 8

Page

Louisiana v. United States,
380 U.S. 145 (1965) 6

Nebraska v. Wyoming,
325 U.S. 589 (1945) 6

Ohio v. Kentucky,
410 U.S. 641 (1973) 6

Petty v. Tennessee – Missouri Bridge Comm., 359 U.S. 275 (1959) 7

Regal Knitwear Co. v. N.L.R.B.,
324 U.S. 9 (1945) 6

Texas v. New Mexico,
462 U.S. 554 (1983) 6, 16, 17

United States v. W. T. Grant Co.,
345 U.S. 629 (1953) 15

Vendro Co. v. Lektro-Vend Corp.,
434 U.S. 425 (1978) 6

Virginia v. West Virginia,
246 U.S. 565 (1918) 6

West Virginia ex rel. Dyer v. Sims,
341 U.S. 22 (1951) 7, 13

STATUTES

U.S. Const. Art. III Section 2,
Clause 2 16

MISCELLANEOUS

"City of Colorado Springs, Arkansas River Review Exchange Plan," Gronning Engineering Co., Denver, Colorado, March, 1986 13

L. Dunlap, R. Lindgen & C. Surer, *U.S. Geological Survey – Water Supply Paper 2253*, (1985) 15

Page

Spronk Water Engineers, Inc.,
Evaluation of the Arkansas River Winter Water Storage Program in Colorado, (June 1985) 11

House Document No. 187, 83rd Congress, 1st Session (June 18, 1953) 11

House Document No. 353, 86th Congress, 2nd Session (March 7, 1960) 11

House Document No. 130, 87th Congress, 1st Session (March 15, 1961) 11

House Report No. 694, 87th Congress, 1st Session (July 11, 1961) 11

Memorandum to the Arkansas River Compact Administration, J. William McDonald, State of Colorado, October 4, 1985 4

Minutes of the Arkansas River Compact Administration Meeting, October 8, 1985 ..... 5, 12, 13, 14

Minutes of the Arkansas River Compact Administration, Appendix C-1, December 14, 1982 9

Minutes of the Investigation Committee, Arkansas River Compact Administration, May 7, 1985 3

Minutes of the Investigation Committee, Arkansas River Compact Administration, June 3, 1985 3

S. S. Papadopulos & Associates, Inc.,
Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact (December 6, 1985) 9

Page

S. S. Papadopulos & Associates, Inc., *Status Report on Evaluation of Streamflow Depletions Along the Arkansas River* (February 17, 1986) 9

Report of Special Master on His Decision and Supplemental Decision Regarding the Affirmative Defenses of New Mexico to the Complaint of Texas, July 6, 1977, at 12-13, *adopted, Texas v. New Mexico*, 434 U.S. 809 (1977) 12

Report to Investigation Committee of the Arkansas River Compact Administration, J. William McDonald, State of Colorado, September 6, 1985 4

Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact, David L. Pope, State of Kansas, September 4, 1985 4

Resolution of the Arkansas River Compact Administration Regarding Continued Violations of Alleged Compact Violations Set Forth in the Resolution of March 28, 1985, As Amended on July 12, 1985 4

Senate Report No. 1742, 87th Congress, 2nd Session (July 19, 1962) 11

Simons, Li & Associates, Inc., *Preliminary Assessment – Development and Administration of Water Resources of the Arkansas River*, (February, 1984) 9, 15

R. Stern and E. Gressman, *Supreme Court Practice*, (5th ed. 1978) 6

Page

Supplemental Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact, David L. Pope, State of Kansas, October 4, 1985 4

Transcript of Special Meeting of the Arkansas River Compact Administration, March 28, 1985 3

No. 105, Original

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

REPLY TO COLORADO'S BRIEF IN OPPOSITION TO MOTION FOR ALTERNATIVE RELIEF

INTRODUCTION

In our reply to Colorado's Brief in Opposition to Motion for Leave to File Complaint we stated that "Colorado . . . has not related the essential facts, has dissembled those it did recite, and would mislead the Court into a decision to decline jurisdiction." *Id.*, at 2. In its Brief in Opposition to Motion for Alternative Relief, Colorado accuses Kansas of "mischaracterizing" Colorado's refusal to investigate Kansas' allegations of

compact violation pursuant to Article VIII(H). Accordingly, it should be clear to the Court that either Kansas or Colorado is not telling it straight.

The object of this reply is to let the facts tell the Court whether Colorado is complying with Article VIII(H) of the Compact or whether Colorado has purposely rendered the administrative investigation futile and useless.

ARGUMENT

POINT I

COLORADO'S REFUSAL TO CONDUCT AN ADMINISTRATIVE INVESTIGATION MAKES LITIGATION KANSAS' ONLY EFFECTIVE REMEDY; ALTERNATIVELY, THE COURT SHOULD COMPEL COLORADO TO COMPLY WITH ARTICLE VIII(H) OF THE ARKANSAS RIVER COMPACT.

A. The Resolution of October 8, 1985 Was *Not* a Bilateral Affirmation that the Investigation Should Proceed, but Rather a Unilateral Rejection of the Investigation in Regard to Each of Kansas' Allegations of Compact Violation.

Colorado puts the fundamental issue this way: "The Administration is not deadlocked or unable to act, but had been proceeding in a cooperative manner to conduct the investigation, notwithstanding differences of opinion as to how the investigation should be conducted . . .." Brief in Opposition to Motion for Alternative Relief, at 1. Without reference to the administrative record or any facts, Colorado explains that in the Resolution of October 8, 1985, "the authorized representatives of the states agreed to continue on the basis of a cooperative approach . . .." *Id.*, at 6.

The essential facts are as follows:

1. In the Compact Administration's Resolution of March 28, 1985, Colorado agreed to investigate all of Kansas' allegations of compact violation. *See,* Exhibit L, Transcript of Special Meeting of the Arkansas River Compact Administration, March 28, 1985.

2. At the meeting of the Administration's Investigation Committee on May 7, 1985, Kansas proposed a scope of work directing the investigation of specific allegations of alleged depletions. Colorado disagreed with this approach and proposed to rewrite the scope of work for consideration in June. Minutes of the Investigation Committee, Arkansas River Compact Administration, May 7, 1985.

3. On June 3, 1985, the Investigation Committee adopted a procedure to compile streamflow data and to construct a series of single and double mass diagrams of the flows of the Arkansas River and the Purgatorie River, the purpose of the mass analyses being to determine whether there had been declines in stateline flows or inflows into John Martin Reservoir. It was agreed that if the diagrams indicated that declines had in fact occurred, further studies would be undertaken to ascertain the causes. Kansas stated that transmountain return flows would have to be accounted for, and Colorado stated that it would not investigate or attempt to quantify transmountain returns. Minutes of the Investigation Committee, Arkansas River Compact Administration, June 3, 1985.

4. On July 10, 1985, Colorado again refused to quantify transmountain return flows.

5. On July 12, 1985, each state submitted its own set of mass analyses. Kansas stated its interpretation that the mass diagrams indicated postcompact depletions to usable stateline flows of 40,000 acre feet annually without adjustment for the masking of additional depletions caused by transmountain

return flows. Colorado acknowledged that stateline flows had declined from 1974-1978, but asserted that the streamflows since 1979 were nearly back to normal.

6. Separate reports, reaching different conclusions, were submitted by Kansas and Colorado in early September, 1985. *See,* "Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact," David L. Pope, State of Kansas, September 4, 1985; "Report to Investigation Committee of the Arkansas River Compact Administration," J. William McDonald, State of Colorado, September 6, 1985. The states could not agree on a single report to the Administration and agreed to prepare supplemental reports interpreting the mass analyses and recommending further studies for the committee, if any. *See,* "Supplemental Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact," David L. Pope, State of Kansas, October 4, 1985; "Memorandum to the Arkansas River Compact Administration," J. William McDonald, State of Colorado, October 4, 1985. *In both reports each state recognized that mass diagram analyses provide no basis on which to identify or isolate causes of indicated depletions.*

7. On October 8, 1985, it was again concluded that the states would have to submit separate reports to the Administration because they could not agree on the conclusions to be drawn from their work or on how to proceed. Colorado recommended further investigation of four possible causes of depletions. Kansas recommended further investigation of ten potential causes of the indicated depletions, including the four Colorado recommended and, most importantly, the development of alluvial wells, the operation of upstream reservoirs, and transmountain return flows. *See,* Resolution of the Arkansas River Compact Administration Regarding Continued

Violations of Alleged Compact Violations Set Forth in the Resolution of March 28, 1985, As Amended on July 12, 1985. In the Resolution, Kansas agreed to investigate everything Colorado proposed to investigate, and Colorado refused to investigate all of Kansas' allegations of compact violation. Transcript of Meeting of Arkansas River Compact Administration, October 8, 1985.

8. At the meeting of the Compact Administration on December 10, 1985, Colorado again rejected Kansas' request to investigate its allegations of depletion of the stateline flows of the Arkansas River. Additionally, Colorado refused to enjoin its postcompact ground water appropriations which result in surface depletions, despite the fact that those appropriations materially deplete the usable and available flows of the Arkansas River.

9. In its Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact of December 6, 1985, Papadopulos & Associates expressed the opinion that postcompact well development in Colorado has materially and substantially depleted the Arkansas River and that Colorado's purposeful attempt to avoid study of well depletions is not remotely justifiable on the basis of any hydrologic or engineering reason.

10. Based on Colorado's refusal to abide by the mandate of Article VIII(H) and its initial agreement to investigate Kansas' allegations of depletion in the Resolution of March 28, 1985, and having no effective alternative but to invoke the original jurisdiction of this Court, Kansas filed this suit on December 16, 1985.

B. The Request for an Order Compelling Colorado to Comply with Article VIII(H) Need Not Be Directed to Invidual Officers of the State of Colorado.

Colorado's argument that its representatives cannot be compelled to do anything because they are not named individually is incorrect. This Court has ordered a state's agents to comply with its rulings although the state's agents were not named. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945); *Arizona v. California*, 376 U.S. 340 (1963). A state acts only through its officers and agents. *Cooper v. Aaron*, 358 U.S. 1 (1958). Accordingly, any order directed to Colorado would necessarily apply to its representatives. *See, Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9 (1945).

C. The Court Has Authority to Compel Compliance with the Provisions of the Arkansas River Compact.

Decisions of the Court confirm its ability in original actions to tailor procedure to the needs of a specific case. Although the Court uses the rules of civil procedure as a guide in original actions, it is not "invariably governed by common-law precedent or by current rules of civil procedure." *Ohio v. Kentucky*, 410 U.S. 641 (1973). Accordingly, the Court has formulated many different methods to deal with cases in its original jurisdiction. *See*, R. Stern and E. Gressman, *Supreme Court Practice*, Section 10.12 (5th ed. 1978).

The Court has authority to compel Colorado's compliance with the compact provisions. A compact is federal law. *See, Texas v. New Mexico*, 462 U.S. 554 (1983). The Court has previously compelled compliance with federal laws, including the enforcement of federal constitutional rights, statutory rights and the mandates of the Court's decisions. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958); *Louisiana v. United States*, 380 U.S. 145 (1965); *Vendro Co. v. Lektro-Vend Corp.*, 434 U.S. 425 (1978). Likewise, the Court has required states to abide by their obligations under a compact and refused to allow them to unilaterally define the scope of their compact obligations. *See, Virginia v. West Virginia*, 246 U.S. 565 (1918);

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951); *Petty v. Tennessee – Missouri Bridge Comm.*, 359 U.S. 275 (1959) (compact obligations enforced under federal law). At the minimum, Kansas is entitled to a meaningful remedy which requires Colorado to comply with its investigatory obligations under the Compact.

1. Postcompact Well Development.

Colorado argues that the states agreed to utilize single and double mass analyses to determine whether there had been any declines in stateline flows and then "to investigate first the most likely causes for such declines . . .." Brief in Opposition to Motion for Alternative Relief, at 8. Not only was there no such agreement, it was agreed by both states that the mass analyses provided no basis whatsoever for identifying causes of indicated declines. *See, supra,* at 5. Ignoring the mandate of Article VIII(H), Colorado has arbitrarily selected four possible causes of the declines and refused to consider six other decidedly more probable causes. *Cf.*, Resolution of October 8, 1985.

Colorado also attempts to cover up its dereliction in ground water regulation by hyperbolizing about "the special expertise of the Administration in addressing the complex hydrologic facts concerning ground water use . . .." Brief in Opposition to Motion for Alternative Relief, at 1. The fact is that Colorado refuses to investigate depletions of surface flows caused by ground water diversions. It also takes no special expertise to know that water sucked through a straw empties a glass just as quickly as sipping off the surface.[1]

---

[1] Colorado spends considerable time complaining about well development in Kansas, which is totally irrelevant except to the extent it has been forced on Kansas because of declines in stateline flows. *See*, Appendix A and discussion at 23-25. Unlike Colorado, Kansas is not violating state and federal law by diverting ground water. No stateline flows are being depleted by wells in Kansas.

In asserting that "the findings by the Colorado Water Judge in December 1976 that there was no competent evidence that stream flows had in fact suffered during the post-well period in Colorado or that reductions, if any, could be traced to well diversions rather than other causes" (*id.*, at 10), Colorado ignores perhaps the most important finding in regard to surface depletion, namely that "there is no dispute that well pumping depletes the river system . . .." *In re the Amendment of the Rules and Regulations Governing the Use, Control and Protection of Surface and Ground Water Rights Located in the Arkansas River and Its Tributaries,* Case Nos. W-4079, W-4080, W-4083, W-4084, and W-4085 (Dist. Ct., Water Division No. 2, Dec. 1, 1976), Finding No. 11, *aff'd sub. nom., Kuiper v. Atchison, Topeka & Santa Fe Ry.*, 195 Colo. 557, 581 P.2d 293 (1978).

Colorado fails to tell the Court that the studies relied on by the Colorado State Engineer,[2] were not discredited in the district court's findings. The thrust of the decision was the conclusion that the State Engineer's proposed amendment to the regulations was "arbitrary and capricious and invalid as a matter of law in that it was not" based on any *empirical* as opposed to what he termed "theoretical hydrological analyses." *Id.*, Conclusion No. 9 at 28; Finding No. 17 at 16.[3]

---

[2] The studies were those the Colorado legislature authorized in S. 407 in 1967. *See,* Reply Brief and Brief in Support of Motion for Leave to File Complaint or Alternatively to Compel Compliance With Administrative Investigation Pursuant to Article VIII(H) of the Arkansas River Compact, at 7-8.

[3] The assertion that the Colorado district court's findings also support Colorado's conclusion "that well development in Colorado does not appear to have been a likely cause of the decline in usable stateline flows . . ." is also without foundation. While the district court did not expressly discredit the pre-1976 studies, Colorado totally hides from

Cont. p. 9

2. Trinidad Reservoir.

Colorado accuses Kansas of 'mischaracterizing' the Compact Administration's recommendation in the Resolution of January 4, 1982, that the Colorado State Engineer immediately release 18,290 acre feet of water unlawfully stored behind Trinidad Dam. Brief in Opposition to Motion for Alternative Relief, at 11. It is true that the resolution did not become "the Administration's recommendation," but only because of Colorado's negative vote.

At the meeting of the Arkansas River Compact Administration on December 14, 1982, Kansas proposed a similar resolution with respect to the subsequent unlawful storage of 20,000 acre feet in violation of "Article IV(D) of the Arkansas River Compact . . .." Minutes of the Arkansas River Compact Administration, Appendix C-1, December 14, 1982, at 44. Instead of voting negatively, Colorado offered a substitute motion denying that the storage was unlawful and urging that the Administration "shall not consider further the allegations of the State of Kansas that the 1979 and 1980 administration of Trinidad Reservoir violate[s] article IV(D) of the Arkansas River Compact . . .." *Id.*, at 44. Due to Colorado's position, no agreement was reached between the states.

Footnote 3, cont. from p. 8.

all of the post-1976 studies. Most of the studies relied on by Kansas in regard to the fact that the alluvial wells in Colorado have severely depleted the surface flows of the Arkansas River are post-1976 studies, *See, e.g.*, Simons, Li & Associates, Inc., "Preliminary Assessment – Development and Administration of Water Resources of the Arkansas River"; S. S. Papadopulos & Associates, Inc., "Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact (December 6, 1985)"; S. S. Papadopulos & Associates, Inc., "Status Report on Evaluation of Streamflow Depletions Along the Arkansas River (February 17, 1986)".

Finally, Colorado's statement that "[t]he Kansas allegations concerning Trinidad Reservoir have not been the focus of the committee investigation . . . [because the Administration] requested the U.S. Bureau of Reclamation to initiate a review of the operating principles for the project . . ." is nonsense. Brief in Opposition to Motion for Alternative Relief, at 15. Colorado also argues "that the review by the Bureau . . . provides an adequate means to address its concerns about the operation of the project." This statement is also absurd. In its Review the Bureau agrees with Kansas that Trinidad Reservoir has been operated in violation of the Operating Principles. In a letter to the Bureau dated March 3, 1986, Colorado takes the same position that it took in its substitute motion on December 14, 1982.

Nothing has changed. Kansas and Colorado have different views of the legality of the operation of Trinidad Reservoir. The Bureau of Reclamation can't do anything about it, and Colorado refuses to submit the issue to arbitration or to allow it to be investigated pursuant to Article VIII(H).

3. Pueblo Reservoir.

Colorado states that "the only question that Kansas suggests should be investigated is whether Colorado complied with a July 24, 1951 resolution of the Administration . . . that there be no reregulation of native waters of the Arkansas River . . . until a plan of operation [has] been . . . approved by the Administration." Brief in Opposition to Motion for Alternative Relief, at 16. Colorado forgets that it initially agreed in the Resolution of March 28, 1985 that the "Arkansas River Compact Administration shall, in accordance with Article VIII(H) of the Arkansas River Compact, promptly investigate . . . the operation of Pueblo Dam and Reservoir . . . and the winter water storage program on the Arkansas River in Colorado . . .." On October 8, 1985, as discussed above, Colorado

repudiated its agreement to investigate the operation of Pueblo Reservoir.

It is Kansas' position that the winter water storage program and the operation of Pueblo Reservoir have adversely affected the regimen of the Arkansas River. Under Article V of the Compact, Kansas is entitled to 40 percent of the water entering the downstream conservation pool of John Martin Reservoir. Prior to 1976, when the storage program went into effect, winter inflows into John Martin averaged 17,400 acre feet annually; since then, the average inflows dropped to 10,900 acre feet.[4] *See, generally*, "Evaluation of the Arkansas River Winter Water Storage Program in Colorado," Spronk Water Engineers, Inc., at 66-68 (June 1985).

While Kansas is more interested in the water Colorado is converting through the operation of its winter water storage program, it is also interested in Colorado's continuing refusal to abide by the Compact Administration's Resolution of July 24, 1951. That Resolution approved the Fryingpan-Arkansas Project with the stipulation that Administration approval of a plan of operation would have to be obtained prior to any reregulation of native water, i.e., winter storage. *See, e.g.*, House Document No. 187, 83rd Congress, 1st Session (June 18, 1953); House Document No. 353, 86th Congress, 2nd Session (March 7, 1960); House Document No. 130, 87th Congress, 1st Session (March 15, 1961); House Report No. 694, 87th Congress, 1st Session (July 11, 1961); Senate Report No. 1742, 87th Congress, 2nd Session (July 19, 1962).

---

[4] The difference of 6,500 acre feet annually may seem small to those unfamiliar with western water disputes. While the figure is a small percentage of the total amount of Colorado's postcompact depletions of stateline flows, it is more water than was involved in one of the Court's last interstate disputes, *viz.*, *Colorado v. New Mexico*, 459 U.S. 176 (1982), *dismissed*, 104 S.Ct. 2433 (1984).

In order to avoid the scrutiny of the Compact Administration pursuant to the Resolution of July 24, 1951, Colorado frivolously argues that the resolution related to the Gunnison-Arkansas Project and not the Fryingpan-Arkansas Project. The simple fact of the matter is that the Roaring Fork Diversion Unit of the Gunnison-Arkansas Project was renamed the Fryingpan-Arkansas Project for political reasons. Until Colorado's recent refusal to investigate the operation of Pueblo Reservoir and the winter water storage program, there was no doubt that the substance of the resolution was unaffected by the name change that was needed to secure the authorization of the project.

Colorado also attempts to avoid its obligation under the resolution by stating that "in any event, Kansas does not deny that the Administration failed to raise an objection to the winter storage program . . . for six years after its operation began . . .." Brief in Opposition to Motion for Alternative Relief, at 16. Laches, however, does not operate against a state in interstate water matters. *See,* Report of Special Master on His Decision and Supplemental Decision Regarding the Affirmative Defenses of New Mexico to the Complaint of Texas, July 6, 1977, at 12-13, *adopted, Texas v. New Mexico,* 434 U.S. 809 (1977).

4. Transmountain Return Flows.

Colorado admits that it has refused to investigate transmountain return flows, but urges inappositely that "[w]ater imported into the Arkansas River Basin is not apportioned to Kansas under" Articles III(B) or IV(A) of the Arkansas River Compact. Kansas has not alleged an entitlement to transmountain waters under the Compact. It is uncontroverted, however, that these transmountain returns add water to the Arkansas River that "mask . . . depletions [of native water] which will continue if these . . . flows are removed from the river." Minutes

of the Arkansas River Compact Administration Meeting, October 8, 1985, at 26. Consequently, the issue of returns is hardly "hypothetical" and the Administration *must* know the amount of the returns to quantify the depletions of native water under Article VIII(H).

In addition to Colorado's refusal to cooperate in order that its courts might approve programs of return flow utilization,[5] Colorado also tries to justify its refusal to quantify return flows by arguing that "it would be difficult, if not impossible, to do so . . .." Brief in Opposition to Motion for Alternative Relief, at 17. This alleged difficulty is belied by Colorado law. In order to obtain a court decree approving a program of return flow utilization, the applicant must be able to isolate the returns from native returns. In Colorado Springs' application, for example, it is asserted in paragraph 6(a)(iv) that:

> Colorado Springs will utilize appropriate measurement and/or accounting methods to determine accurately on a daily basis the portion of return flows of the Fountain Creek that is attributable to return flows from the Transmountain Sources . . ..

See, "City of Colorado Springs, Arkansas River Review Exchange Plan," Gronning Engineering Co., Denver, Colorado, March, 1986. *See, generally*, "Application for an Absolute Right for Existing Exchange and Reuse Program and for a Conditional Decree for a Proposed Exchange and Reuse Program in the Arkansas River and Its Tributaries," Water Division No. 2, Case No. 84-CW-203; *see, also*, Application of the Board of Water Works of Pueblo, Colorado, Case No. 84-CW-177.

---

[5] Colorado's tactic is legally unsound because its courts have no authority to define its obligations under a compact. *See, West Virginia ex rel Dyer v. Sims*, 341 U.S. 22 (1951). Nevertheless, as a practical matter, Colorado is seeking to tie up the only wet water that's still in the river.

Transmountain return flows in the Arkansas River are neither hypothetical nor metaphysical. They are an essential matter that Colorado refuses to investigate.[6] There is no possibility that Colorado will even discuss the matter – its representative to the Administration's Investigation Committee has "ruled out" any assessment of transmountain returns. *See,* Minutes of the Arkansas River Compact Administration Meeting, October 8, 1985, at 32.

POINT II

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY AUTHORITY BY ENJOINING COLORADO'S POSTCOMPACT WELL USES UNTIL COMPLETION OF A MEANINGFUL ADMINISTRATIVE INVESTIGATION.

Colorado has noted the traditional requisites of injunctive relief and that the issuance of the equitable order rests in the sound discretion of the Court. While Kansas has no quarrel with these elements in theory, Colorado's application of the elements to the facts misses the mark.

Colorado asserts that there is no threat of irreparable harm to Kansas, while ignoring its unilateral refusal to investigate the documented finding that the proliferation of wells has

---

[6] There are nine structures that divert water into the Arkansas River Basin from the Colorado River Basin. The mean annual transmountain diversion before the Arkansas River Compact was adopted was 16,430 acre feet. In the postcompact period 1949-1973, the mean annual diversion was 68,950 acre feet. In the critical period 1974-1984, when Colorado depleted the stateline flows by approximately 50,000 acre feet annually (without accounting for the masking), the mean was 137,450 acre feet. In other words, the amount of masking of native depletions in violation of the Compact is not small.

caused 150,000 acre-feet per year of depletion to the Arkansas River. *Preliminary Assessment – Development and Administration of Water Resources of the Arkansas River, Art. IV.* This continuing damage is not imaginary; it is immediate, continuing, and cannot begin to be rectified until Colorado complies with the mandate of Article VIII(H) of the Compact. *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953) (recurrent injury provides basis for injunctive relief); *Chance v. Board of Examiners,* 561 F.2d 1079 (2d Cir. 1977) (continuing violations constitute irreparable harm). In the meantime, however, Colorado proposes that Kansas idly ignore the substantial depletions in stateline flows until Colorado benevolently decides to honor its compact obligations.

The resulting injury to Kansas is apparent. Due to Colorado's unregulated pumping from the aquifer hydraulically connected to the live river above John Martin Reservoir, "the average stateline flow during the period of 1974 through 1979 was 55 cfs, a major reduction." As illustrated in Appendix A, Colorado's acquiescence in unregulated well pumping has resulted in a marked reduction of ditch deliveries to Kansas for irrigation.

This damage cannot be hidden by Colorado's assertion that "Kansas water users have an alternative source of supply available from wells." Colorado's Brief in Opposition to Motion for Alternative Relief, at 19. The fact is that Kansas has been forced to make up the deficiency in surface deliveries by tapping the nonrenewable ground water of the Ogallala aquifer. During 1979 through 1980, Kansas' necessary appropriations of ground water have caused the Ogallala aquifer to decline from 20 to 80 feet. L. Dunlap, R. Lindgen & C. Surer, *U.S. Geological Survey – Water Supply Paper 2253,* at 48 (1985).

Given the substantial depletion of the Ogallala aquifer caused by Colorado's continuing reduction of stateline surface flows, the suggestion that Kansas has no irreparable harm and "has

no substantial likelihood of success on [its] claim" is implausible. Colorado's Brief in Opposition to Motion for Alternative Relief, at 19. Certainly Kansas will not succeed on the merits if Colorado continues to stonewall the administrative process. With a meaningful determination of surface flow declines, however, Kansas' entitlement to its apportioned share of the Arkansas River flow cannot be seriously disputed. Pending that determination, Colorado should be enjoined from all post-compact well uses in the Arkansas River Valley.

CONCLUSION

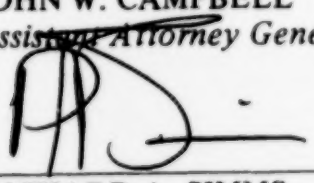
In Justice Brennan's opinion for the Court in *Texas v. New Mexico*, 462 U.S. 554 (1982), it was noted that access to the Court's original jurisdiction raises a question of "the *practical necessity* of an original forum in this Court for particular disputes within our constitutional original jurisdiction." *Id.*, at 570 (emphasis added). Despite the mandatory command of Article VIII(H) of the Compact, Colorado has repeatedly refused to investigate Kansas' allegations of violation. If Kansas is denied the remedy contemplated in Article III, Section 2, Clause 2 of the Constitution of the United States, Colorado

could "for all practical purposes, avoid [this forum] at will." *Texas v. New Mexico*, 462 U.S. 554, 569 (1982).

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Assistant Attorney General



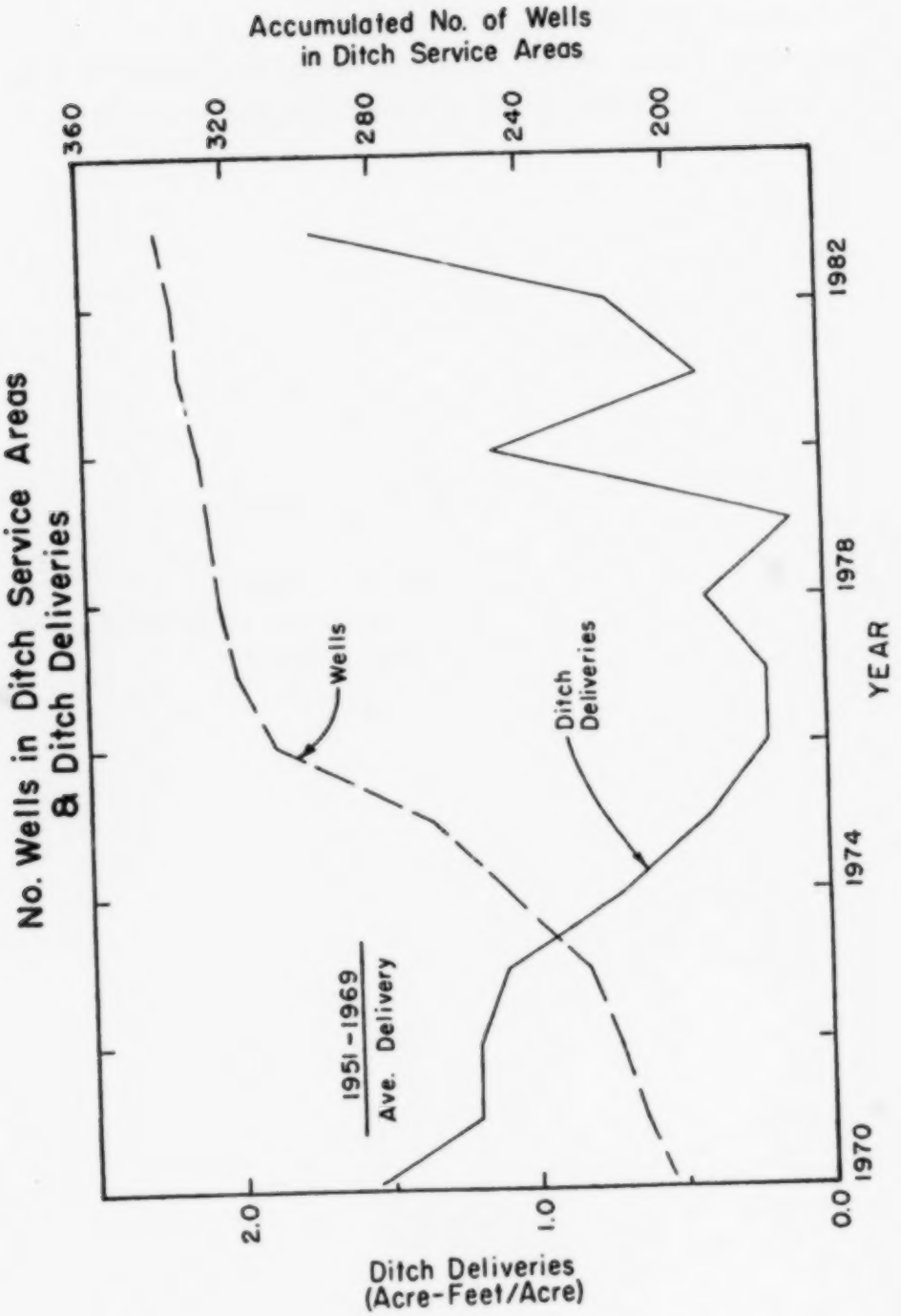
RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

THOMAS M. HNASKO

BRUCE ROGOFF

Hinkle, Cox, Eaton, Coffield & Hensley
218 Montezuma
Post Office Box 2068
Santa Fe, New Mexico 87504
(505) 982-4554

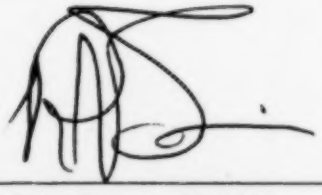
APPENDIX A


Accumulated No. of Wells
in Ditch Service Areas
360
320
280
240
200
No. Wells in Ditch Service Areas
& Ditch Deliveries
Wells
Ditch
Deliveries
1951-1969
Ave. Delivery
1982
1978
1974
1970
YEAR
2.0
1.0
0.0
Ditch Deliveries
(Acre-Feet/Acre)

CERTIFICATE OF SERVICE

Pursuant to Rule 28(5) of the Supreme Court Rules, I certify that three copies of the foregoing Reply to Colorado's Brief in Opposition to Motion for Alternative Relief were served on March 18, 1986 on:

David W. Robbins
Hill & Robbins
1441 Eighteenth Street, Suite 100
Denver, Colorado 80202



RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record